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In the Supreme Court of the United States

OCTOBER TERM, 1983

COPPERWELD CORPORATION, ET AL., PETITIONERS

v.

INDEPENDENCE TUBE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

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QUESTION PRESENTED

Whether joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, should be subject to liability under Section 1 of the Sherman Act, 15 U.S.C. 1.

TABLE OF CONTENTS

	Page
Interest of the United States and the Federal Trade Commission	1
Statement	2
Summary of argument	3
Argument:	
Joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, should not be subject to liability under Section 1 of the Sherman Act	6
A. The Sherman Act affords different degrees of latitude to various types of business conduct, depending on their probable competitive effects	7
B. The intraenterprise conspiracy doctrine is inconsistent with the general scheme of antitrust analysis applied by courts because it rests on considerations of form, rather than on the recognition that joint conduct of commonly owned and controlled corporations is in substance unilateral conduct	12
C. Elimination of the intraenterprise conspiracy doctrine would further the purposes of the Sherman Act	21
Conclusion	29

TABLE OF AUTHORITIES

Appalachian Coals, Inc. v. *United States*, 288 U.S. 344	13, 18
Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263, cert. denied, 444 U.S. 1093	9, 10, 11
Blankenship v. *Herzfeld*, 661 F.2d 840	9
Brenner v. *World Boxing Council*, 675 F.2d 445, cert. denied, No. 81-2301 (Oct. 4, 1982)	9

Cases—Continued Page

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 10
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 11
California Computer Products, Inc. v. *International Business Machines Corp.*, 613 F.2d 727 11
Callanan v. *United States*, 364 U.S. 587 11
Chicago Board of Trade v. *United States*, 246 U.S. 231 10
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 ..... 10, 13, 27, 28
Contractor Utility Sales Co. v. *Certain-Teed Products Corp.*, 638 F.2d 1061 9
Dussouy v. *Gulf Coast Investment Corp.*, 660 F.2d 594 ..... 13, 14
FTC v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 9
H & B Equipment Co. v. *International Harvester Co.*, 577 F.2d 239 ..... 13, 14
Harvey v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 24
Joseph E. Seagram & Sons, Inc. v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, cert. denied, 396 U.S. 1062 ..... 13, 14, 25
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 ..... 2, 18, 19, 20, 22, 25
Morton Buildings of Nebraska, Inc. v. *Morton Buildings, Inc.*, 531 F.2d 910 ..... 13, 14
National Society of Professional Engineers v. *United States*, 435 U.S. 679 10
Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F.2d 911, cert. denied, 345 U.S. 925 ..... 13, 14
Northern Pac. Ry. v. *United States*, 356 U.S. 1 ..... 8, 10
Ogilvie v. *Fotomat Corp.*, 641 F.2d 581 23
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 ..... 2, 18-19, 20
Photovest Corp. v. *Fotomat Corp.*, 606 F.2d 704, cert. denied, 445 U.S. 917 ..... 3, 23
Poller v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, rev'd, 368 U.S. 464 ..... 13, 14

Cases—Continued Page

Roesch, Inc. v. *Star Cooler Corp.*, 671 F.2d 1168 9
Schwimmer v. *Sony Corp. of America*, 677 F.2d 946, cert. denied, No. 82-277 (Nov. 8, 1982) 13-14
SCM Corp. v. *Xerox Corp.*, 645 F.2d 1195, cert. denied, 455 U.S. 1016 11
Spectrofuge Corp. v. *Beckman Instruments, Inc.*, 575 F.2d 256, cert. denied, 440 U.S. 939 .....9, 13, 14
Standard Oil Co. of New Jersey v. *United States*, 221 U.S. 1 ..... 9, 10
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 20
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 .....2, 18, 19, 20
Tose v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, cert. denied, 454 U.S. 893 14
United States v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336 16
United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 ..... 27, 28
United States v. *Citizens & Southern National Bank*, 422 U.S. 86 20
United States v. *Crescent Amusement Co.*, 323 U.S. 173 18
United States v. *Empire Gas Corp.*, 537 F.2d 296, cert. denied, 429 U.S. 1122 9
United States v. *Feola*, 420 U.S. 671 11
United States v. *Grinnell Corp.*, 384 U.S. 563 16
United States v. *Reading Co.*, 253 U.S. 26 17-18
United States v. *Yellow Cab Co.*, 332 U.S. 218 ..... 2, 5, 17, 18, 19, 20, 21, 24
Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 9
William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 668 F.2d 1014, cert. denied, No. 81-2083 (Oct. 4, 1982) 23

Statutes and regulations:

Clayton Act, Section 7, 15 U.S.C. (& Supp. V) 18.... 16, 26
Federal Trade Commission Act, Section 5, 15 U.S.C. (& Supp. V) 45 .....6, 9, 27

Statutes and regulations—Continued — Page

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. (& Supp. V) 18a 17
Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):
Section 482 25
Sections 1501-1504 (& Supp. V) 25
Sherman Act, 15 U.S.C. 1 *et seq.*:
Section 1, 15 U.S.C. 1 ..... *passim*
Section 2, 15 U.S.C. 2 ..... *passim*
Section 8, 15 U.S.C. 7 13
16 C.F.R. Part 800:
Section 801.1(a)(1) 17
Section 801.2 17
Section 802.30 17

Miscellaneous:

2 P. Areeda & D. Turner, *Antitrust Law* (1978) 15
Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) 11
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Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981) 18, 26
Hirshleifer, *Economics of the Divisionalized Firm*, 30 J. Bus. 96 (1957) 15
Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L. J. 213 (1979) 11
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Miscellaneous—Continued

Page

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R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials* (2d ed. 1981) 15
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U.S. Dep't of Justice, Merger Guidelines, 2 Trade Reg. Rep. (CCH) ¶ 4500 (June 14, 1982) 16

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

On March 21, 1983, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a brief supporting petitioners as to the first question presented,[1] and on June 20, 1983, the Court granted the petition for a writ of certiorari, limited to the first question presented.

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[1] Contrary to respondent's contention (Supp. Br. in Opp. 2), our earlier submission did not "concede[] that the activities of petitioners here resulted in an unreasonable restraint of trade to the ultimate detriment of consumers." Rather, we simply expressed the view that the second question presented by the petition did not warrant review by this Court. See U.S. Amicus Br. 3-4 n.8.

This case raises the question whether joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, should be subject to liability under Section 1 of the Sherman Act, 15 U.S.C. 1. The United States and the Federal Trade Commission have primary responsibility for enforcement of the federal antitrust laws. They therefore have an interest in assuring that the Sherman Act is construed and applied in a manner that most effectively advances the Act's objective of protecting the Nation's competitive economic system.

STATEMENT

The court below upheld a jury finding that petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, conspired to restrain trade in the structural steel tubing market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent Independence Tube Corporation, plaintiff below, alleged that joint actions of the petitioners caused a third company (Yoder) to cancel its contract to provide respondent with a tubing mill, and that as a result respondent was unable to enter the structural steel tubing market until some nine months later than if Yoder had not cancelled the contract.[2] In affirming the jury verdict, the court of appeals relied on a line of this Court's decisions[3] for the proposition that a parent corporation and its wholly-owned subsidiary may be treated as separate entities capable of conspiring within the meaning of Section 1 of the Sherman Act (Pet. App. A10-A11 & n.8). Re-

[2] Respondent originally contended that Yoder had conspired with petitioners, but the jury found that Yoder had not participated in a conspiracy (Pet. App. A6).

[3] These decisions include *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

ferring to a list of factors set out in one of its prior decisions,[4] the court of appeals concluded that the evidence supported the jury's conclusion that petitioners were sufficiently separate from each other to be subject to Section 1 liability for their joint activities (*id.* at A11-A17, A40-A42).

SUMMARY OF ARGUMENT

The court below held that concerted action by petitioners—a parent and its wholly-owned subsidiary—is subject to Section 1 of the Sherman Act, 15 U.S.C. 1, relying on what has come to be known as the "intraenterprise conspiracy doctrine." We urge the Court to reassess that doctrine and to hold that when common ownership and control of two corporations is itself lawful, the mere fact that those corporations coordinate their activities will not subject them to Section 1 liability.

1. The basic question in reassessing the intraenterprise conspiracy doctrine is whether joint activities of commonly owned and controlled companies should be subject to Section 1 of the Sherman Act, or only to Section 2 of the Act, 15 U.S.C. 2. Congress and the courts have articulated distinct standards applicable to various types of business conduct under the Sherman Act. The least intrusive standard is applied to unilateral, or single firm, conduct. Such conduct is subject only to Section 2, which is not violated unless a firm's market power is such that its conduct would create at least a dangerous probability of monopolization. Concerted conduct is subject to the stricter standard of Section 1, which prohibits conduct that creates an unreasonable restraint of trade. In applying Section 1, the courts have developed a further distinction. Concerted conduct that involves, for example, the creation or transfer of productive units (*e.g.*, a merger) is judged according to the "rule of rea-

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[4] *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

son," under which courts examine market power and market structure to determine whether the adverse effects of a combination are unlikely to outweigh its benefits. Concerted conduct that directly eliminates horizontal competition and involves no joint production or distribution activity is judged under a standard of per se illegality.

These distinctions are based on common sense and sound economic reasoning. It is appropriate to apply the least intrusive standard to unilateral conduct, because such conduct does not directly eliminate independent economic decision making and because it is often difficult in practice to distinguish between desirable "hard" competition and predatory conduct that will decrease consumer welfare in the long run. Concerted conduct merits more careful scrutiny because it always reduces the number of independent economic decision makers. If a combination involves, *e.g.*, the creation or transfer of productive units or contractual reallocation of functions, some overall consumer benefit may result, so that it is appropriate to conduct an economic inquiry to evaluate the probable effect of the combination. But if a combination directly eliminates competition and involves no joint production or distribution activity, prohibiting it, even in the absence of market power, preserves competition without economic loss.

2. The intraenterprise conspiracy doctrine is inconsistent with the general scheme of antitrust analysis applied by the courts because it relies on considerations of form rather than substance. Courts have held correctly that concerted action by a corporation and its officers and employees amounts to action by a single economic enterprise and thus is not subject to Section 1. Likewise, courts have properly held Section 1 inapplicable to concerted action by a corporation and its unincorporated divisions, again because they constitute a single economic enterprise.

There is no good reason to distinguish a firm's operation through separately incorporated subsidiaries from its operation through unincorporated divisions for purposes of determining the applicable standard of antitrust liability. A firm's choice to operate through subsidiaries does not change the fact that the different entities remain part of a single economic enterprise, with the controlling entity determining the extent of any "competition" among the subordinate units. The concept of "agreement" has little meaning in the context of commonly owned and controlled corporations; a controlling parent always has the power to achieve the ends it desires by directing the actions of subordinate units, so that, unlike the situation of two separate firms, agreement does not eliminate a potential for independent decision making.

Courts and enforcement agencies treat commonly owned and controlled corporations as a single economic enterprise in other areas of antitrust, such as analysis of market power in connection with mergers and acquisitions. But the lower courts have viewed this Court's decisions as precluding a similar focus on economic substance in the case of intraenterprise "conspiracy." Although *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the apparent source of the intraenterprise conspiracy doctrine, can be read narrowly, subsequent decisions give broader scope to the doctrine.

3. Elimination of the intraenterprise conspiracy doctrine would further the purposes of the Sherman Act. The doctrine undermines the goals of the Act by needlessly inhibiting enterprises from adopting a form of business organization that may enable them to compete more effectively. The doctrine fails to recognize that for antitrust purposes intraenterprise conduct is in substance unilateral. Under the doctrine, such conduct, which normally would be judged under Section 2 standards, may be condemned when there is no significant probability of monopolization, and, depending on the type of "agree-

ment" that is found, may even be judged under a standard of per se illegality—a standard at the opposite end of the spectrum from the standard otherwise applicable to unilateral conduct. Attempts to limit the scope of the doctrine have not adequately addressed this anomaly. Practical considerations also support a reassessment of the doctrine, which has resulted in uncertainty, confusion, and inefficiency.

A holding that joint action of commonly owned and controlled corporations does not, in itself, constitute an agreement within the meaning of Section 1, would not impair the government's enforcement capabilities. Anticompetitive conduct by such enterprises would remain subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. In addition, the government could continue to prosecute various legal "persons" within a single economic enterprise when such "persons" conspire or otherwise violate the law in other legal contexts.

ARGUMENT

JOINT ACTIVITIES AMONG SEPARATELY INCORPORATED COMPANIES THAT ARE COMMONLY OWNED AND CONTROLLED, AND THUS ARE PARTS OF A SINGLE ECONOMIC ENTERPRISE, SHOULD NOT BE SUBJECT TO LIABILITY UNDER SECTION 1 OF THE SHERMAN ACT

The court below held that petitioners, a parent corporation and its wholly-owned subsidiary, constitute separate economic entities for purposes of Section 1 of the Sherman Act, 15 U.S.C. 1.[6] Proceeding from this prem-

[6] Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony * * *.

ise, the court concluded that the evidence supported a jury finding that petitioners' "concerted" conduct directed against respondent violated Section 1. The court's premise—that joint activities between petitioners are subject to Section 1—rests expressly on a line of this Court's decisions (see page 2 note 3, *supra*) that form the basis for what has come to be known as the intraenterprise conspiracy doctrine.

We believe this case presents an appropriate vehicle for the Court to reexamine the intraenterprise conspiracy doctrine, and we urge the Court to undertake such a reexamination. The doctrine appears to be inconsistent with the general scheme of antitrust analysis applied by the courts. By elevating form over substance, the doctrine results in analysis of what is essentially unilateral conduct under the more stringent antitrust standards designed for concerted conduct. Moreover, the doctrine has led to uncertainty and inefficiency. The Court should hold that when common ownership and control of two corporations is itself lawful, the mere fact that these corporations coordinate their activities will not subject them to Section 1 liability.

A. The Sherman Act Affords Different Degrees of Latitude to Various Types of Business Conduct, Depending on Their Probable Competitive Effects

The basic question in reassessing the intraenterprise conspiracy doctrine is whether joint activities of commonly owned and controlled companies should be subject to Section 1 of the Sherman Act, or only to Section 2 of the Act, 15 U.S.C. 2.[6] In addressing that question, it is useful to examine the manner in which the Sherman Act affords different degrees of latitude to various types of business conduct, depending on their probable effects on competition.

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[6] Section 2 prohibits monopolization and attempts to monopolize, whether by means of unilateral or joint conduct. In addition, it prohibits conspiracies to monopolize.

1. The fundamental purpose of the Sherman Act is to "preserv[e] free and unfettered competition" in the nation's economic system. *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958). The Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources." *Ibid.* The Act prohibits conduct that Congress and the courts have identified as posing a significant threat to competition. But it is also important to the objectives of the Act that it not be applied to penalize or deter conduct that promotes competition and increases consumer welfare.

Congress and the courts have recognized these dual concerns by establishing distinct standards for determining the legality under the Sherman Act of three basic categories of business conduct. The standards applied to unilateral, or single firm, conduct intrude the least on entrepreneurial discretion.[7] Unilateral conduct is subject only to Section 2 of the Act, which is not violated unless a firm's market power is such that its conduct would create at least a dangerous probability of monopo-

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[7] The basic productive unit in a market economy is the "enterprise" or "firm." Those terms generally refer to "an independent *unit* of private ownership and control over productive and potentially profit-making assets and operations." J. Bain, *Industrial Organization* 5 (1959). A single firm consists of "the total of assets and operations which is by virtue of common ownership under a single control group or management * * *. Separate enterprises [or firms] are recognized as complexes of assets and operations which are under separate ownerships and separate and independent control groups or managements, so that one management does not have the legal right or power to direct the activities of the other." *Ibid.* For a classic discussion of the firm, see Coase, *The Nature of the Firm*, 4 Economica 386 (Nov. 1937).

In our earlier submission in support of the petition, we used the term "economic entity" to refer to a firm or enterprise. Since it appears that the term "economic unit" is used by some economists to refer to subunits of a single firm (see Supp. Br. in Opp. 3 n.1), we will attempt to avoid confusion by using the terms "firm" and "enterprise," as defined above, in this brief.

lization.[8] Concerted conduct is subject to the stricter standard of Section 1 of the Act, which prohibits conduct whenever it constitutes an unreasonable restraint of trade,[9] regardless of whether it creates a danger of monopolization. Section 1 reaches only conduct in the form of contracts, combinations or conspiracies, and thus does not apply to unilateral conduct.[10]

In applying Section 1, the courts have developed a further distinction. Combinations that may increase efficiency by, for example, the creation or transfer of productive units or contractual reallocations of distribution activity (*e.g.*, mergers, joint ventures and various types of vertical agreements) are judged under the "rule of reason," under which courts consider the market power of the firms involved and the structure of the relevant

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[8] See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 302-307 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977). Cf. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965).

The courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45. See *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953). In addition, state tort or contract law may provide damages and other relief for certain types of unilateral conduct that harm competitors. Indeed, in this case the jury found that petitioners had tortiously interfered with respondent's contractual rights. Pet. App. A6-A7.

[9] See *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

[10] See, *e.g.*, *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); *Contractor Utility Sales Co.* v. *Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1171 (8th Cir. 1982); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 451 (2d Cir. 1982), cert. denied, No. 81-2301 (Oct. 4, 1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981).

markets in determining whether the net effect of the combination is anticompetitive or procompetitive.[11] On the other hand, combinations that eliminate competition and promise no significant economic benefit, such as horizontal price-fixing and market allocation, are conclusively presumed to be anticompetitive and are deemed per se unlawful, without elaborate analysis of market power or market structure.[12]

2. These distinctions are based on common sense and sound economic reasoning. They further the purposes of the Sherman Act by focusing the Act's deterrent force on conduct most likely to be harmful to competition, while shielding conduct that is likely to further consumer welfare.

It is appropriate that the antitrust laws be least intrusive with respect to single firm conduct. Such conduct does not result in any direct loss of independent economic decision making. Moreover, individual firm decisions on matters such as pricing and introduction of new products provide the "hard" competition among independent enterprises that the antitrust laws are designed to foster. It often is difficult in practice, however, to distinguish between "hard" competition that benefits consumers (even if it harms rivals) and conduct that will have the long-run effect of lessening competition and consumer welfare.[13] Therefore, a relatively nonintrusive standard

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[11] See, *e.g.*, *Standard Oil Co. of New Jersey* v. *United States*, *supra*; *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 301-302.

[12] See, *e.g.*, *Northern Pac. Ry.* v. *United States*, *supra*, 356 U.S. at 5; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978).

[13] Witness the difficulties experienced by courts and commentators in trying to develop a formula for determining whether particular price reductions are socially beneficial price cuts or "predatory"

for unilateral conduct is preferable, since, if plaintiffs could recover damages under the Sherman Act for injury attributable to nothing more than "hard" competition, the incentive for firms to compete aggressively would be materially diluted, to the detriment of consumer welfare.[14]

Combinations of otherwise independent economic entities are properly subject to stricter scrutiny either under the rule of reason, or, in some cases, under a standard of per se illegality. Unlike unilateral conduct, which will have anticompetitive effects only in very limited circumstances, all combinations among otherwise independent economic entities reduce to some extent the number of independent decision makers, thus raising sufficient anticompetitive potential to merit careful scrutiny of their effects on competition.[15] In a system de-

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pricing. See, *e.g.*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); R. Posner, *Antitrust Law: An Economic Perspective* 184-196 (1976); R. Bork, *The Antitrust Paradox* 149-155 (1978); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979).

[14] In recognition of this concern, this Court has emphasized that the statutory goal is the protection of competition, not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Economic harm inflicted on rivals because of their inability to operate efficiently or to offer products attractive to consumers is not the sort of harm Congress intended to prevent under the antitrust laws. See, *e.g.*, *SCM Corp.* v. *Xerox Corp.*, 645 F.2d 1195, 1205 (2d Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 273; *California Computer Products, Inc.* v. *International Business Machines Corp.*, 613 F.2d 727, 732 (9th Cir. 1979).

[15] Congress's determination to impose a more stringent Sherman Act standard on concerted conduct also is consistent with the stricter standards for multiparty conduct reflected in the common law treatment of conspiracies. See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961).

signed to foster multiple independent sources of economic decision making, there is little reason to tolerate concerted business conduct among rivals unless it involves an integration of resources under common control or a contractual sharing of functions that holds out the possibility of increased output, lower prices, or other procompetitive benefits that cannot be attained by individual firms.

If a transaction involves, *e.g.*, the creation or transfer of productive or distributive units—as do mergers, joint ventures, and distribution agreements—some consumer benefits in the form of increased efficiency are likely. Accordingly, it is worth analyzing whether, on balance, the anticompetitive effects of the transaction outweigh its benefits, and prohibiting only combinations that are more likely to have anticompetitive effects. However, if a combination of independent economic enterprises directly eliminates horizontal competition and involves no joint production or distribution activity, as in the case of a price-fixing agreement, nothing is lost by prohibiting it without the more detailed economic inquiry required in rule of reason cases.

B. The Intraenterprise Conspiracy Doctrine Is Inconsistent With the General Scheme of Antitrust Analysis Applied by Courts Because It Rests on Considerations of Form, Rather Than on the Recognition That Joint Conduct of Commonly Owned and Controlled Corporations Is in Substance Unilateral Conduct

The intraenterprise conspiracy doctrine is out of step with the general scheme of antitrust analysis applied by the courts because it relies on considerations of corporate form, rather than substance. Under the doctrine, economically identical conduct may be subject to either the most or the least stringent Sherman Act standard simply on the basis of an enterprise's choice of corporate form. The doctrine fails to recognize that joint conduct of

commonly owned and controlled corporations is in substance unilateral conduct.

1. This Court has stressed that the choice of antitrust standards applicable to particular conduct should turn on considerations of economic substance rather than form. See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 46-47 (1977); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 377 (1933). The lower courts have applied this principle in concluding that certain forms of joint conduct in fact amount to unilateral conduct that is not subject to Section 1.

Section 1 prohibits any "person" from engaging in a combination or conspiracy unreasonably to restrain competition, while Section 8 of the Act, 15 U.S.C. 7, defines the term "person" to include corporations and associations, as well as individuals. Thus, if applied literally, Section 1 could be invoked against joint conduct among a firm and its officers or employees, or between two officers cooperating on behalf of their firm. However, the courts have avoided such a formalistic approach and have properly recognized that in a complex economy the relevant economic unit is likely to be larger than a single individual. The courts uniformly have held that although a corporation and its officers and employees are separate legal persons, concerted action among them amounts to action by a single economic enterprise and therefore does not violate Section 1.[16] The rationale for

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[16] See, *e.g.*, Pet. App. A9; *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, *supra*, 575 F.2d at 286-287; *Dussouy* v. *Gulf Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-917 (8th Cir. 1976); *Schwimmer* v. *Sony Corp. of America*,

this approach is that "[a] corporation can act only through its employees, and if an agreement between a corporation and an employee could be a Sherman Act conspiracy, the plurality requirement [of Section 1] would lose all meaning." *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978).[17] For similar reasons, the courts have properly held Section 1 inapplicable to concerted action by a corporation and its unincorporated divisions. The divisions are part of a single economic enterprise, as well as a single legal unit, and "[t]reble damages should not be assessed against a corporation merely because it has adopted an organizational division of labor • • •." *Id.* at 244.[18]

2. There is no good reason to distinguish a firm's operation through separately incorporated subsidiaries from its operation through unincorporated divisions for purposes of determining the applicable standard of antitrust liability. Antitrust analysis rests on the basic assumption that a firm will organize and use its productive assets

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677 F.2d 946, 953 (2d Cir. 1982), cert. denied, No. 82-277 (Nov. 8, 1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-894 (3d Cir.), cert. denied, 454 U.S. 893 (1981). The courts recognize an exception to this principle in the case of an individual who conspires with the corporation to further his own interests and thus is not acting on behalf of the corporation. See, *e.g.*, *H & B Equipment Co.*, *supra*, 577 F.2d at 244; *Morton Buildings of Nebraska, Inc.*, *supra*, 531 F.2d at 916-917.

[17] See also, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, *supra*, 200 F.2d at 914 (corporation does not violate Section 1 when it exercises its right to select customers and to refuse to sell its goods through its officers and agents, "which is the only medium through which it can possibly act"); *Dussouy* v. *Gulf Coast Investment Corp.*, *supra*, 660 F.2d at 608.

[18] See also, *e.g.*, Pet. App. A9; *Spectrofuge* v. *Beckman Instruments*, *supra*, 575 F.2d at 287; *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors Ltd.*, *supra*, 416 F.2d at 83-84; *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d at 603.

so as to maximize its total profits.[19] In doing so, the firm may decide to operate through divisions or through separately incorporated subsidiaries, and it may or may not grant the divisions or subsidiaries a considerable degree of operational independence. In some cases, divisions or subsidiaries may appear to "compete" with one another or with the parent. Despite this appearance, subdivisions that are under common ownership and control cannot properly be viewed as "independent" enterprises or "competitors" in an economic or antitrust sense; rather, they remain part of a single economic enterprise.[20] The relationship between them will be the result primarily of management decisions rather than market forces.[21] The controlling entity will determine the extent of any "competition" or operational "independence" of the subordinate units based on its conclusions about how best to maximize the profits of the aggregate enterprise—an objective that may be inconsistent with maximizing competition among the commonly controlled units.[22] Any

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[19] See generally, *e.g.*, L. Sullivan, *Antitrust* 22-23 (1977); R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials*, 4-11, 728-729, 1060-1069 (2d ed. 1981); 2 P. Areeda & D. Turner, *Antitrust Law* 267-281 (1978).

[20] The fact that a parent and its subsidiaries are "held out" as, or appear to the public to be, competitors does not provide an antitrust policy reason to treat them as independent economic decision makers. Basing liability on a "holding out" theory suggests that some misrepresentation causes injury to the public. But none of this Court's Section 1 decisions that mention the public appearance of independence as a reason for treating commonly owned and controlled firms as independent decision makers (see pages 19-20, *infra*) suggests that the public was deceived or that deception concerning common control of corporations implicates the policies that led Congress to impose stricter standards on multiparty conduct than on actions of a single economic decision maker.

[21] See Posner & Easterbrook, *supra*, at 729-730.

[22] For an economic analysis of decision making involving commonly owned and controlled units within a single firm, see, *e.g.*, Hirshleifer, *Economics of the Divisionalized Firm*, 30 J. Bus. 96 (1957).

"concerted" activity by a parent and a subsidiary it owns and controls is in substance no different from the joint activities of a company and its unincorporated divisions or a company and its officers.

Moreover, the concept of "agreement," which is central to Section 1, has little meaning in the context of commonly owned and controlled corporations. While an agreement between two separate firms reduces or eliminates the possibility of independent economic decision making, no such possibility exists within a single firm. A controlling parent has the power to achieve the ends it desires by directing subordinate units to take certain action; a subsidiary in turn can act only within limits set by the controlling parent. Thus, even if there appears to have been conscious agreement between commonly owned and controlled units, such an agreement would not have any competitive significance, because it does not eliminate previously independent centers of decision making.

3. Courts and enforcement agencies treat commonly owned and controlled companies as a single economic enterprise under various provisions of the antitrust laws, based on the recognition that formal corporate structure of an enterprise is irrelevant to issues of anticompetitive effect. For example, parent corporations and separately incorporated subsidiaries are considered as one for the purpose of determining market power in Section 2 cases.[23] In addition, the assets and sales of corporate subsidiaries are analyzed as if they were parts of a single firm in determining whether an acquisition would be illegal under Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18, because of a resulting increase in concentration of market power.[24] Under Federal Trade Commission reg-

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[23] See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 567 (1966); *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1345, 1348 n.33 (D.D.C. 1981).

[24] For example, the Department of Justice Merger Guidelines (2 Trade Reg. Rep. (CCH) ¶ 4500 (June 14, 1982)) focus on the

ulations implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. (& Supp. V) 18a, an acquisition made through a separate subsidiary is subject to the premerger reporting requirements of the Act to the same extent as an acquisition made directly by the parent; in addition, the regulations expressly define as a single "person" all entities under common control.[25]

4. Despite their focus on economic substance in dealing with joint conduct involving corporate officers and divisions, and in analyzing commonly owned and controlled corporations in some contexts, and their acknowledgment that "as a practical matter, there may be little difference between a wholly-owned subsidiary and a fully integrated division" (Pet. App. A9), the courts of appeals have construed this Court's decisions as requiring —at least in some situations—the application of Section 1 standards to joint action by separately incorporated parts of the same economic enterprise. See, *e.g.*, Pet. App. A9-A11. *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), is generally recognized as the source of this intraenterprise conspiracy doctrine.

The violation alleged in *Yellow Cab* included the consolidation under single control of formerly independent corporations as a means of effectuating an illegal agreement not to compete. 332 U.S. at 229.[26] In this context,

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market shares of "firms" (the economic units), rather than "corporations."

[25] 16 C.F.R. 801.1(a)(1), 801.2. Mergers of commonly owned and controlled corporations will not lessen competition, because they do not alter ownership and control. For this reason, creation of, or mergers among, wholly-owned subsidiaries of the same parent are expressly exempted from the Commission's premerger notification rules. See 16 C.F.R. 802.30.

[26] Defendants had obtained "86% of the Chicago market [for sale of taxicabs], 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market." 332 U.S. at 224. The Court viewed the complaint as alleging that these market shares had been achieved " 'by deliberate, calculated purchase for control.' " *Id.* at 227-228 (quoting *United States* v. *Read-*

the Court rejected the suggestion that a restraint illegal under Section 1 could not result from "a conspiracy among those who are affiliated or integrated under common ownership" (*id.* at 227); it stated that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman] Act" (*ibid.*).[27] The language the Court employed was broad. However, its decision can be viewed as holding only that separately incorporated, commonly controlled corporations are subject to Section 1 if the agreement at issue has the purpose or effect of bringing formerly independent corporations under common ownership, thereby restraining competition.[28]

The Court applied and expanded its *Yellow Cab* statements in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S.

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ing Co., 253 U.S. 26, 27 (1920)). The complaint in *Yellow Cab* also alleged that the combination constituted a conspiracy to monopolize in violation of Section 2 of the Sherman Act.

[27] The Court further stated that "the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S. at 229.

[28] Some commentators have suggested this reading of *Yellow Cab*. See, *e.g.*, Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), *reprinted in* Pet. App. I. The cases cited by the Court in *Yellow Cab* (see 332 U.S. at 227-228) seem to support this reading. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-361, 376-377 (1933), involved formation of a joint selling agency. In *United States* v. *Reading Co.*, 253 U.S. 26, 57 (1920), the restraint identified by the Court arose from acquisitions by a holding company that gave it control of competing railroads and coal companies. And in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944), the Court upheld a divestiture decree on the ground that "the *creation* of the combination is itself the violation" (emphasis added).

134 (1968). In *Timken Roller Bearing Co.* the alleged violations included acquisitions of partial ownership interests in horizontal competitors and agreements among those corporations to fix prices and allocate territories. Justice Black there noted that the ownership interests "were obtained as part of a plan to promote the illegal trade restraints" (341 U.S. at 600) and characterized the resulting intercorporate relationship as "the core of the conspiracy" (*id.* at 601). Thus, *Timken* resembles *Yellow Cab* in that the result the Court reached could have been justified on the ground that the acquisitions themselves implemented illegal agreements between formerly independent firms and for that reason constituted an unlawful restraint.

However, in *Kiefer-Stewart Co.* and *Perma Life Mufflers, Inc.*, the Court applied the broad language of *Yellow Cab*, rather than what can be viewed as its more limited holding, to find Section 1 violations by commonly owned corporations in cases in which the alleged violations did not include a combination of formerly independent enterprises.[20] Indeed, in *Kiefer-Stewart* the Court applied

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[20] In *Kiefer-Stewart*, the Court found that commonly owned corporations had entered into an illegal conspiracy to fix maximum resale prices. It rejected defendants' argument that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." 340 U.S. at 215. It was the Court's view that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws" (*ibid.*, citing *United States* v. *Yellow Cab Co.*, *supra*). The Court added, without explanation, that "[t]he rule is especially applicable where, as here, respondents hold themselves out as competitors" (*ibid.*). Compare note 20, *supra*.

In *Perma Life*, the Court held that certain sales agreements between a parent corporation and its wholly owned subsidiary violated Section 1. (The Court also read the complaint as charging conspiracies outside the group of affiliated corporations, 392 U.S. at 142, but its holding was not confined to those external conspiracies.) No acquisition was involved, and again the Court offered no

the per se standard of illegality to conduct that, if it had been recognized as unilateral, would have been entirely legal. In neither of the decisions did the Court refer to the significance of the distinction between the legal standards applied to unilateral and concerted conduct under the Sherman Act; nor did it mention any economic considerations indicating that there would have been significant competition among the entities under common ownership and control in the absence of the challenged agreements.[30]

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explanation for the decision to impose Section 1 liability, other than that the defendants had "availed themselves of the privilege of doing business through separate corporations, [and] the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." 392 U.S. at 141-142, citing *Timken Roller Bearing Co.* v. *United States*, *supra*, 341 U.S. at 598, and *United States* v. *Yellow Cab Co.*, *supra*, 332 U.S. at 227.

[30] In at least one case, however, the Court has recognized that ownership and control can be more significant than separate legal identity. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court held that where 12,000 growers had organized into three separate legal entities, those commonly owned entities should be deemed a single organization, so that their dealings with each other were shielded from antitrust liability by the Capper-Volstead Act.

The Court's most recent reference to the intraenterprise conspiracy notion was in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975). There the Court, citing *Yellow Cab*, *Kiefer-Stewart*, *Timken*, and *Perma Life*, stated that "even commonly owned firms must compete against each other, if they hold themselves out as distinct entities." 422 U.S. at 116. The United States in *Citizens & Southern* also cited the intraenterprise conspiracy decisions in support of its contention that the so-called "five-percent banks" should not be treated as if they were de facto branches of C&S for Sherman Act purposes (Brief for the United States at 30). However, contrary to respondent's contention (Supp. Br. in Opp. 4-5), the United States' allegation that affiliated corporations violated Section 1 was not based on a theory of conspiracy among corporations within a single enterprise. Rather, the government pointed out that the alleged corporate parent owned only five percent of the stock of the smaller banks and was prohibited by state law from owning or controlling more. In that context, the

C. Elimination of the Intraenterprise Conspiracy Doctrine Would Further the Purposes of the Sherman Act

We urge the Court to reexamine the intraenterprise conspiracy doctrine, as developed in *Yellow Cab* and its progeny, and to hold that agreements between or among commonly owned and controlled corporations[31] constituting a single economic enterprise are not subject to liability under Section 1 of the Sherman Act. Such a holding would advance the Sherman Act policy of imposing less intrusive strictures on unilateral business conduct than on concerted conduct by otherwise inde-

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government contended that the smaller banks were not subordinate units of C&S by virtue of ownership, but were controlled by it only through the very agreements at issue. Accordingly, the government contended that the five-percent banks should have been viewed as legally and economically distinct decision makers fully subject to Section 1 if they agreed with C&S to fix prices or restrain competition in some other manner (Brief for the United States at 24-25, noting that C&S lacked the power legally to require the smaller banks to conform their competitive behavior to its wishes). However, the Court held that C&S's "de facto" branching through the five-percent banks was procompetitive and that no illegal agreement among the banks had been proved. 422 U.S. at 114, 117-120.

[31] In referring to commonly controlled corporations, we mean those corporations under common ultimate legal control through ownership of voting stock. Control of one corporation by agreement with another corporation in the absence of common ownership should remain subject to Section 1.

In the case of a parent corporation and its wholly-owned subsidiary, it is clear that the parent, through ownership of voting stock, has ultimate control of the productive assets of the subsidiary. Two wholly-owned subsidiaries of the same parent also would be commonly controlled. Common control could exist in the case of substantial partial ownership as well; in the case of ownership of more than 50% of a subsidiary's stock it may be appropriate (and it would serve judicial economy) to presume that there is common control. However, an agreement between two independent corporations that have partial ownership interests in a third corporation should be viewed as concerted action under Section 1.

pendent entities.[32] It also would eliminate the uncertainty and inefficiency that have resulted from the intraenterprise conspiracy doctrine.

1. The formalistic approach of the intraenterprise conspiracy doctrine fails to recognize that for antitrust purposes intraenterprise conduct is in substance unilateral. Thus, the doctrine is inconsistent with the statutory framework of distinct standards for unilateral and joint conduct and the sound economic policy that framework reflects (see pages 8-12, *supra*). Application of the doctrine can constrain single enterprises in their competitive efforts through the threat of antitrust liability, even where there is no significant probability of monopolization. Indeed, in some cases application of the doctrine can have the drastic consequence of transmuting otherwise legal conduct into conduct that is per se illegal. For example, in *Kiefer-Stewart*, pricing decisions that would have been legal if regarded as unilateral were analyzed as if they constituted conduct at the opposite extreme of the antitrust spectrum, *i.e.*, they were found to be per se illegal under Section 1 conspiracy standards.

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[32] Even if one believed that Section 2 of the Sherman Act should be applied more broadly, *i.e.*, to reach unilateral conduct that restrains trade, but does not raise a danger of monopoly, there would be no reason to impute to Congress an intent to apply a stricter standard only to those enterprises that organize themselves into separate subsidiaries.

Contrary to respondent's contention (Br. in Opp. 8, 19-25; Supp. Br. in Opp. 3, 7-8), a holding by this Court that commonly owned and controlled corporations cannot "conspire" in restraint of trade within the meaning of Section 1 would not amount to a judicially created "antitrust exemption." Rather, like the courts' treatment of intracorporate activity involving officers, employees, and unincorporated divisions, it would simply recognize that joint conduct within a single economic enterprise is not the sort of concerted action Congress intended to subject to the strictures of Section 1. As we make clear in the text, such conduct would still be subject to Section 2 of the Act.

Efforts to temper the effect of the intraenterprise conspiracy doctrine have been largely unsuccessful.[33] The Seventh, Eighth and Ninth Circuits have sought to narrow the scope of the doctrine somewhat by limiting it to situations in which a parent and subsidiary appear to operate more in the manner of independent entities than as a single firm.[34] Those circuits employ a multifactor analysis that requires consideration of numerous aspects of the operating relationship between the affiliated corporations, with the relative weight and importance of the factors left to the factfinder to determine "how much separation [the companies] in fact maintained in the conduct of their business" (Pet. App. A16).[35] Respondent also would limit the scope of the doctrine. Under respondent's theory, which might be described as an "external restraints" test, Section 1 would apply to intraenterprise conduct only in cases in which the companies not only maintain some degree of operational independence, but also engage in joint conduct that disadvantages the trade of third parties (Br. in Opp. 15-16).[36]

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[33] See Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 668-676 (1982).

[34] See, *e.g.*, *William Inglis & Sons Baking Co.*, v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-1055 (9th Cir. 1981), cert. denied, No. 81-2083 (Oct. 4, 1982); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588-589 (8th Cir. 1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); Pet. App. A11.

[35] For example, the jury here was instructed to determine whether "the two companies, in fact, operated as separate entities" by considering the companies' histories; whether they had separate staffs and offices; whether the parent paid the subsidiary's expenses; the extent of the subsidiary's policymaking independence; the extent of the subsidiary's outside sales; whether the companies had separate records and accounts; whether they were "separate participants" in the alleged unlawful acts; whether the companies had separate officers and directors; and "any other facts that you find that are relevant." Pet. App. A40-A41.

[36] Such an approach has been articulated from time to time as a means of limiting the scope of this Court's broad language in

But neither the "all factors" test employed by the courts below nor the "external restraints" test advocated by respondent presents an adequate solution. Such tests fail to recognize that even if there is a general pattern of operational independence, it does not evidence the existence of independent economic enterprises, but rather essentially unilateral management decisions by the controlling entity. Similarly, existence of an effect on third parties does not overcome the fact that agreements among commonly owned and controlled corporations do not involve the aggregation of economic power that engenders Section 1 concerns.

It is not surprising that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical" (Pet. App. A9; footnotes omitted).[37] Petitioners and amici have cited numerous scholarly articles supporting the view that the doctrine impairs economically efficient organization and fails to advance antitrust objectives. Respondent cites authority for the proposition that this Court's decisions support an intraenterprise conspiracy challenge to conduct of a parent and subsidiary that unreasonably restrains the trade of third

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Yellow Cab and its progeny, while expanding the scope of the Sherman Act prohibition against unilateral conduct. In 1955, a majority of the Attorney General's National Committee to Study the Antitrust Laws expressed the view that Section 1 of the Sherman Act applied to concerted action by a corporate parent and its subsidiary directed against a third party even if the Section 2 criteria for an attempt to monopolize were not met. *Report* at 35. Indeed, a footnote in the 1977 *Antitrust Guide for International Operations* of the Antitrust Division of the Department of Justice (see Pet. 20-21; Br. in Opp. 14, 21) suggested that under existing law, "coercive attempts by members of a corporate group to drive third parties out of business or out of markets" would be illegal under Section 1. But the Division has not subsequently developed or pursued that suggestion in its enforcement activities and has looked instead to Section 2 criteria in such situations.

[37] See also, *e.g.*, *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 456 n.8 (9th Cir. 1979) ("the [intraenterprise conspiracy] theory has been subjected to much criticism and comment").

parties (Br. in Opp. 14-15), but it identifies no commentary to support the proposition that joint conduct by commonly owned and controlled corporations is analogous, in terms of Section 1 concerns about aggregations of economic power, to concerted action by otherwise independent firms.[38]

2. Practical considerations reinforce our view that a reassessment of the intraenterprise conspiracy doctrine is advisable. The doctrine has failed to provide the business community with clear guidance. The existing confusion and conflict among the circuits concerning the doctrine (see our earlier amicus submission at 12-14), and the number and complexity of factual issues that courts have considered in applying it (see page 23, note 35, *supra*) create difficulties for firms seeking to make efficient choices regarding corporate structure. The threat of antitrust actions alleging intraenterprise conspiracy could cause a firm to avoid separately incorporated subsidiaries, even if that organizational structure otherwise would yield lower costs and prices.[39] In addition, the pos-

[38] Respondent contends (Br. in Opp. 23-25) that a holding that joint actions by commonly owned and controlled corporations do not constitute an agreement for purposes of Section 1 of the Sherman Act would be inconsistent with other areas of the law in which separately incorporated subsidiaries are treated as distinct from the parent firm. However, subsidiary corporations are not uniformly treated as independent economic units. See, *e.g.*, 26 U.S.C. (& Supp. V) 1501-1504 (consolidated tax returns) and 26 U.S.C. 482 (Secretary's authority to allocate income and deductions among related entities). Even if they were, this would not compel a similar result under the Sherman Act, which reflects different policies and concerns from those underlying other areas of the law.

[39] Respondent contends (Br. in Opp. 22) that there is no empirical evidence that the threat of Section 1 liability has deterred separate incorporation. However, the existence of subsidiaries merely shows that some corporations are willing to take the antitrust risk; others may have been deterred from doing so. Cf. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84 (indicating that Seagram converted its subsidiaries to divisions after this Court's *Kiefer-Stewart* decision). Moreover, the threat

sibility of treble damages awards based on intraenterprise conspiracy encourages the filing of federal antitrust suits alleging what appear to be at worst unilateral business torts that do not raise monopoly concerns.[40] Moreover, application of an "all factors" test precludes dismissal at an early stage of litigation and requires wide-ranging (and ultimately irrelevant[41]) factual inquiries.

A holding that joint action of commonly owned and controlled corporations does not, in itself, constitute an agreement within the meaning of Section 1, would not impair the government's antitrust enforcement capabilities.[42] If common control arises from acquisition, the acquisition is subject not only to Section 1 of the Sherman Act, but also to Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18. Anticompetitive conduct by commonly

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of Section 1 liability may constrain structuring of relationships among subsidiaries.

Respondent also notes (Br. in Opp. 22-23) that tax considerations, rather than considerations of efficiency, were apparently the motive for separate incorporation in this case. However, the responses of business entities to the incentives provided by the tax system presumably are those Congress sought to encourage; if not, they should be addressed through the tax laws without the distortion that results from the intraenterprise conspiracy doctrine.

[40] Here the "restraint" alleged is essentially an interference with contract claim. Respondent dismissed its Section 2 claims before trial (Pet. App. A6).

[41] Most of the factors considered under an "all factors" test look not to whether there are truly independent decision makers, but to how control is exercised or to whether a parent corporation has chosen to delegate considerable operational independence.

[42] As some commentators have noted, the intraenterprise conspiracy doctrine has been invoked primarily in private treble damages actions. See Pet. 14, quoting Handler & Smart, *supra*, 3 Cardozo L. Rev. at 24-25. The United States has occasionally cited the Court's intraenterprise conspiracy decisions. See note 30, *supra*. However, the doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years.

owned and controlled corporations would remain fully subject to antitrust enforcement under the standards applicable to other unilateral conduct. Thus, it would be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances.

Abolition of the intraenterprise conspiracy doctrine would not preclude prosecution of various legal "persons" within a single economic enterprise when such "persons" conspire or otherwise violate the law in other legal contexts. The mere fact that corporate officers and employees work within a single economic enterprise does not mean they cannot be co-conspirators in some types of cases. For example, it is clear that corporate officials within a single economic enterprise can conspire with each other, *e.g.*, to defraud the government and thereby violate the law. In addition, where a conspiracy among distinct economic enterprises exists, a criminal or civil action can be brought under Section 1 against responsible officials, as well as against the corporations for which they acted.[43]

3. Of course, we are aware that the Court does not lightly reevaluate its prior holdings. However, we believe such a reassessment would be proper in this case. The intraenterprise conspiracy notion derives from this Court's prior decisions (see pages 17-20, *supra*); it is entirely appropriate for the Court to reexamine those decisions if it concludes that "the need for clarification of the law in this area justifies reconsideration." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 47. The Court's determination in *GTE Sylvania* to reexamine its prior decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was prompted by

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[43] The cases cited by respondent in its Supplemental Brief in Opposition (at 5) are ones in which affiliated corporations were named as co-conspirators in connection with alleged combinations involving other, distinct economic enterprises. Thus, they do not rely on a theory of conspiracy solely between affiliated corporations.

its recognition that "*Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts * * * have sought to limit its reach." 433 U.S. at 47-48 (footnotes omitted). The Court in *GTE Sylvania* also recognized that reexamination was warranted because the *Schwinn* holding was inconsistent with economic principles underlying the antitrust laws. See 433 U.S. at 51-59.

As we have shown, a judicial reassessment of the intraenterprise conspiracy doctrine is appropriate for essentially the same reasons articulated in *GTE Sylvania*. We urge the Court to hold that joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, are not subject to liability under Section 1 of the Sherman Act. Such a holding would confine the application of Section 1 to combinations of formerly independent economic enterprises, while continuing to subject intraenterprise conduct to Section 2, consistent with the system of Sherman Act standards established by Congress and the courts; it would provide increased certainty in the application of the antitrust laws; and it would allow firms to make decisions about their internal organization without incurring the risk of treble damages liability for unilateral conduct that does not amount to a Section 2 violation.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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